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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA STATE HOSPITAL AND NURSING HOME ASSOCIATION, an Alaska non-profit corporation, Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, Defendant.	Case No. 3AN-19-8244 CI

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Alaska State Hospital and Nursing Home Association ("ASHNHA"), an Alaska non-profit corporation, by and through counsel of record, Holmes Weddle & Barcott, P.C., hereby moves for summary judgment on its claims declaring that Defendant State of Alaska, Department of Health and Social Services ("DHSS") cannot enact and/or enforce emergency or permanent regulations changing 7AAC 145, 7 AAC 150, 7 AAC 160 and 7 AAC 190. As a matter of law, these emergency regulations and proposed

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permanent regulations are inconsistent with both state and federal law, are arbitrary and violate due process. This Motion is supported by the Affidavit of Becky Hultberg, Affidavit of Preston Simmons, Affidavit of Timothy Bateman, MD, and Affidavit of Allison Lee, filed herewith.

I. BACKGROUND

According to the most recent information provided by DHSS, as of June 30, 2019, 215,817 total Alaskans are covered by Medicaid, nearly 30% of Alaska's total population. Of that number, 93,946 are children aged 18 years of age or less. Hultberg Afft. ¶16.

On June 28, 2019 Governor Mike Dunleavy line item vetoed approximately $444 million from the Fiscal Year 2020 budget provided to him by the Alaska Legislature. Within those vetoes, Governor Dunleavy specifically reduced the amount of Medicaid funding available to DHSS by $77 million. Of that reduction, $27 million was due to the elimination of adult dental coverage and $50 million was a further reduction in overall Medicaid funding. *Id.* at ¶2.

It is believed that Governor Dunleavy intended through this $77 million veto to only veto $58 million in general fund dollars and $19 million from federal match dollars. However, Governor Dunleavy has vetoed the full $77 million from general fund dollars, costing the state in excess of $40 million additional federal match dollars.[1] The net result of this action by Governor Dunleavy is a reduction of $117 million to pay for Medicaid services in Alaska. *Id.* at ¶3.

[1] The additional $19 million would have leveraged an additional $40 million based on the traditional 30/70 general fund/federal match percentage or "FMAP".

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Also on June 28, 2019, DHSS adopted, as emergency regulations, changes to Title 7 of the Alaska Administrative Code (specifically, 7 AAC 145, 7 AAC 150, 7 AAC 160, and 7 AAC 190) dealing with reimbursement rates for Medicaid services. Exhibits A and B to Hultberg Afft. Specifically, DHSS's emergency regulations suspend inflation-based payment rate increases while also imposing a 5% across the board cut to reimbursements for fiscal year 2020. Hultberg Afft. ¶7. Fiscal year 2020 began on July 1, 2019, giving providers three days' effective notice over a weekend.

The "Finding of Emergency" signed by Commissioner Crum for each regulation package provides as the sole reason for the emergency regulations that the costs of providing Medicaid services in Alaska "will exceed the amount allocated in the state budget for fiscal year 2020. The Medicaid program, one of the largest components in the state budget, will be significantly underfunded in fiscal year 2020." Exhibits A and B to Hultberg Afft.

Given the simultaneous nature of Governor Dunleavy's line-item vetoes and Commissioner Crum's "Finding of Emergency" it appears that the underfunding causing this emergency is not an "emergency" at all. This underfunding is an occurrence entirely of the Dunleavy Administration's own deliberate creation.

On or before July 5, 2019 DHSS proposed to make these emergency regulations permanent prior to their expiration on October 28, 2019. See Exhibit C to Hultberg Afft.

For facilities, rate cuts and inflationary freezes such as those imposed by the emergency regulations result in reimbursement below the reasonable cost of services as required in AS 47.07.070. *Id.* at ¶10.

Some types of providers can shift those cost overruns to other payers. Other providers with thin financial margins or a high ratio of Medicaid patients cannot do so. Accordingly, the reductions imposed will cause reduction in the medical services available to community and/or the actual closure of provider facilities. See the Affidavit of Becky Hultberg, Affidavit of Preston Simmons, Affidavit of Timothy Bateman, MD, and Affidavit of Allison Lee.

II. STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment should be granted where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[2] "A party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment as a matter of law."[3]

Once the moving party has made this prima facie showing, the burden shifts to the non-moving party to avoid judgment by producing "admissible evidence that reasonably demonstrates a triable issue of fact exists."[4] To rebut the movant's prima facie showing

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2 Alaska R. Civ. P. 56(c).

3 *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 517 (Alaska 2014) (citing *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 760 n.25 (Alaska 2008)).

4 *Burnett v. Covell*, 191 P.3d 985, 990 (Alaska 2008).

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and defeat summary judgment, the non-moving party must "set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists."[5] "The adverse party may not rest upon mere allegations, but must set forth specific facts showing there is a genuine issue of material fact."[6] Summary judgment is appropriate when no reasonable person could discern any genuine factual dispute on a material issue.[7] A material fact is one upon which resolution of an issue turns.[8] A genuine issue of material fact only exists, "where reasonable jurors could disagree on the resolution of a factual issue."[9]

B. Review of Regulations

The Alaska Supreme Court has explained the review of agency regulations:

> [W]e consider first whether the board exceeded its statutory mandate in promulgating the regulation, either by pursuing impermissible objectives or by employing means outside its powers. Determining the extent of an agency's authority involves the interpretation of statutory language, a function uniquely within the competence of the courts and a question to which we apply our independent judgment. Second, we consider whether the regulation is reasonable and not arbitrary. Where highly specialized agency expertise is involved, we will not substitute our own judgment for the board's. Our role is to ensure only that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making. And third, we consider whether the regulation conflicts with any other state statutes or constitutional provisions.[10]

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5 *Christensen*, 335 P.3d at 517 (citing *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n.32 (Alaska 1978)).

6 *Burnett*, 191 P.3d at 990.

7 *Christensen*, 335 P.3d at 520.

8 *Id.* at 519 (citing *Sonneman v. State*, 969, P.2d 632, 635 (Alaska 1998)).

9 *Burnett*, 191 P.3d at 990.

10 *Id., quoting Grunert v. Grunert (Grunert I)*, 109 P.3d 924, 926-28 (Alaska 2005).

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The Court presumes the validity of the regulation, and the plaintiff bears the burden of showing that it is invalid.[11]

A court reviews emergency regulations the same way it reviews other agency regulations.[12] Emergency regulations also require a finding that the regulations are "necessary for the immediate preservation of the public peace, health, safety, or general welfare." AS 44.62.250. As a matter of state policy, "emergencies are held to a minimum and are rarely found to exist." AS 44.62.270. In addition to the other grounds applicable to regulations, a court may declare an emergency regulations invalid "upon the ground that the facts recited in the statement do not constitute an emergency under AS 44.62.250." AS 44.62.300.

III. ARGUMENT

A. The Emergency Regulations and Proposed Permanent Regulations Are Inconsistent with State and Federal Law.

1. Federal Law

"Medicaid is a cooperative federal-state program through which the federal government reimburses the state for certain medical expenses incurred on behalf of needy persons."[13] States do not have to participate in the program, but those that do "must comply

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11 *Id.*

12 *State of Alaska, Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006).

13 *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1241 (9th Cir. 2013), q*uoting Alaska Dep't of Health and Soc. Servs. v. Ctrs. For Medicare & Medicaid Servs.*, 424 F.3d 931, 934 (9th Cir. 2005).

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both with the statutory requirements imposed by the Medicaid Act and with regulations promulgated by the Secretary of [HHS]."[14]

Under federal law, every State's Medicaid Plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan…as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.[15]

Congress expressly delegated to the Secretary the authority to administer the Medicaid program and approve State Plans, and the Secretary has delegated that authority to the regional administrator for the Center for Medicare and Medicaid Services ("CMS").[16] "CMS must review and approve or reject any proposed amendment to the state Medicaid plan," referred to as a State Plan Amendment ("SPA").[17]

As states attempt to reduce Medicaid costs through rate reductions, the federal courts, including the Ninth Circuit, have found invalid rate-reduction statutes and regulations that are not approved by CMS,[18] and have affirmed reductions or other changes whereby the change was considered and approved by CMS under the standards set in §30(A) through a State Plan Amendment process.[19] "[B]y its terms §30(A) requires a

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14 *Id.*

15 42 U.S.C. § 1396a(a)(30)(A)(emphasis added).

16 *Managed Pharmacy Care*, 716 F.3d at 1241.

17 *Id.*

18 *The ARC of California v. Douglas*, 757 F.3d 975, 987 (9th Cir. 2014).

19 *Managed Pharmacy Care*, 716 F.3d at 1248-49; *Alaska Dep't of Health and Soc. Servs.*, 424 F.3d at 934 (holding CMS properly denied plan amendment under requirement that rates be consistent with efficient, economy

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substantive result—reimbursement rates must be consistent with efficiency, economy, and quality care, and sufficient to enlist enough providers to ensure adequate beneficiary access."[20] In approving plans with rate reductions, courts have confirmed that CMS must actually consider whether the rates are sufficient to allow equal access to care "at least to the extent that such care and services are available to the general population in the geographic area," as §30(A) expressly requires.[21]

In *The ARC of California v. Douglas,*[22] the State of California attempted to implement a 3% across the board reduction with additional changes to holiday and half-day billing in the payment of services for developmentally disabled individuals under the Medicaid program. The Ninth Circuit held that the district court abused its discretion in denying a preliminary injunction because the ARC had shown a likelihood of success on the merits under §30(A).[23] "By adopting those policies without studying at all their likely effects on the efficiency, economy, quality of care, and access to care California offered the developmentally disabled, the state officials probably disregarded Section 30(A)'s express mandate."[24] The Ninth Circuit again confirmed that the State must seek an

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and quality of care under Section 30(A)). *But see California Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1016 (9th Cir. 2013) (holding that states must provide certain healthcare services, including adult dental, podiatry, optometry, and chiropractic services under Medicaid Act, and that CMS did not have authority to approve a plan that did not require such services).

20 *Id.*

21 *Hoag Memorial Hospital Presbyterian v. Price*, 866 F.3d 1072, 1079 (9th Cir. 2017) (invalidating SPA plan including 10% rate reduction approved by CMS for failure to consider equal access to care) (collecting cases).

22 *The ARC of California v. Douglas*, 757 F.3d 975, 987 (9th Cir. 2014).

23 *Id.*

24 *Id.*

amendment to its State Plan before implementing rate reductions or other cost-saving measures.[25]

And in *Hoag Memorial Hospital Presbyterian v. Price*,[26] the Ninth Circuit invalidated California's 10% rate reduction for outpatient services when challenged by 57 hospitals, even though that rate reduction was approved by CMS in a SPA process. The Ninth Circuit found that CMS's approval of the SPA was arbitrary and capricious because it failed to consider equal access to care as expressly required by §30(A).[27]

The emergency regulations and proposed permanent regulations at issue here violate federal law because the State has not studied the efficiency, economy, quality of care, and access to care impacted by the drastic rate reductions, nor has it gone through the SPA process required before such rate reductions go into effect. This should not be a surprise to the State. In its presentation to the Legislature earlier this year, DHSS acknowledged "[a]ll rate adjustments must be approved through the Centers for Medicare and Medicaid Services (CMS) State Plan Amendment (SPA) process." See Exhibit E to Hultberg Afft. (emphasis added).

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25 *Id.* at 984 n.4 ("Arc also argued that California failed to obtain CMS's approval of the payment reductions before implementing policies that affected the payments service providers received under its plan. For over thirty years, we have repeatedly held that a state must submit such an SPA and obtain approval before implementing any material change in a plan.")(collecting cases); *California Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1018 (9th Cir. 2013) (finding an abuse of discretion for lower court not to issue preliminary injunction, and warning state that pre-approval from CMS is needed before rate changes).

26 *Hoag Memorial*, 866 F.3d at 1079.

27 *Id.*

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2. State Law for Facility Rates

In 1997, Congress deleted the Medicaid Act requirement (the Boren Amendment) that payments not be "in excess of reasonable charges," but left intact the requirement that they be "consistent with efficient, economy, and quality of care."[28] This change was meant to provide the states more flexibility in rate-setting, but did not change the Secretary's oversight role in confirming rates were consistent with §30(A).[29] Unlike the equal access to care standard that must be considered in the SPA approval process, the Ninth Circuit has confirmed that while it is logical for a state and CMS to consider costs of care in studying beneficiary access to care, it is not expressly required under §30(A).[30]

This change in federal law has not found its way into Alaska statutes, which still mandate that rates be based on "reasonable costs" of care for facility rates. Thus, in addition to violating federal law, the emergency regulations and proposed permanent regulations applicable to facilities violate the very statute our legislature has enacted on payment rates for health care facilites and are thus invalid as a matter of state law.[31]

While Alaska has a cost containment statute that contemplates rate reductions, AS 47.07.036, that does not mean that facility rates still need not be based on "reasonable costs related to patient care" as provided in AS 47.07.070, the statute that governs what rates shall be paid to health care facilities. Once rates are determined by the State under this

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28 *Alaska Dep't of Health and Soc. Servs. v. Ctrs. For Medicare & Medicaid Servs.*, 424 F.3d 931, 941 (9th Cir. 2005).
29 *Id.*
30 *Managed Pharmacy Care*, 716 F.3d at 1249.
31 AS 47.07.070.

statutory standard, denying the facilities a cost of living adjustment and further cutting rates 5% across the board is by its very terms inconsistent with paying a rate based on the "reasonable costs related to patient care." The Alaska Supreme Court has said that "a regulation that significantly undercompensated every facility's actual costs would be presumptively inconsistent" with Alaska's rate-setting statute.[32] Because the emergency regulations and proposed permanent regulations are inconsistent with this statute, they are invalid.[33]

The Alaska Supreme Court dealt with a similar issue in *North Slope Borough v. Sohio Petroleum Corp.*,[34] where a regulation enacted to protect state revenues by limiting the applicability of a tax credit was found to be inconsistent with the statute clearly granting a tax credit without the exception the State was trying to create by regulation. Although the State argued that the emergency regulation was needed to avoid the "total erosion of the State tax base and complete diversion of revenue from a state resource to a single privileged borough,"[35] the court rejected this argument. As here, that type of policy change needed to be accomplished by a change to the statute, not by a regulation that would be inconsistent with the policy set by the legislature.

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32 *State. Dep't of Health & Social Servs. v. Valley Hosp. Ass'n Inc.*, 116 P.3d 580, 585 (Alaska 2005), considering regulations based on the prior version of AS 47.07.070(a)(2000), which similarly required reimbursement based on "a fair rate for reasonable costs incurred by the facility."

33 *State of Alaska, Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006) ("[W]e conclude that the emergency regulation authorized an allocation of fishery resources within a single fishery in violation of the authorizing statute.").

34 585 P.2d 534, 543-44 (Alaska 1978).

35 *Id.* at 544.

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B. The Emergency Regulations and Proposed Permanent Regulations Are Arbitrary and Unreasonable.

In addition to exceeding its statutory mandate (both under federal law and state law), the emergency regulations and proposed permanent regulations are invalid because they are unreasonable and arbitrary.[36] The regulations are invalid because the agency failed to "take[] a hard look at the salient problems and has [not] genuinely engaged in reasoned decision making."[37]

In deciding whether a regulation is reasonable and not arbitrary, the court should scrutinize the process, not policy.[38] "An agency's decision will be regarded as arbitrary where it fails to consider an important factor."[39] A regulation must be reasonably related to its goal, and the agency must "take a close look at the problems it seeks to address and consider important policy factors, even if 'every policy factor may not have been debated.'"[40]

Under federal law, DHSS must also study and consider the efficiency, economy, quality of care, and access to care impacted by the drastic rate reductions under §30(A).[41] While DHSS purports to consider the short term impact of the funding shortfall on care in its Finding of Emergency, DHSS has not considered what the rate reductions will do in the

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36 *State of Alaska, Bd. of Fisheries v. Grunert*, 139 P.3d 1226, 1232 (Alaska 2006).

37 *Id.*

38 *Ellingson v. Lloyd*, 342 P.3d 825, 830-31 (Alaska 2014) (holding that regulation defining "feral" was arbitrary).

39 *Id.*

40 *Id., quoting Gilbert v. State, Dep't of Fisheries*, 803 P.2d 391, 398 (Alaska 1990).

41 *Hoag Memorial*, 866 F.3d at 1079 (invalidating SPA plan including 10% rate reduction approved by CMS as arbitrary and capricious for failure to consider equal access to care) (collecting cases).

longer term to access to care for all Medicaid recipients. If providers are underfunded, they will have to cut services and access to care will go down. The State has not considered what fewer services will be available, and whether those services are still sufficient to provide Medicaid recipients access to care "at least to the extent that such care and services are available to the general population in the geographic area," as §30(A) expressly requires.[42]

Moreover, as set forth above, AS 47.07.070 provides that facility rates must also be based on the "reasonable costs related to patient care." The Alaska Supreme Court has twice found DHSS regulations arbitrary or unreasonable because they did not allow the consideration of the most accurate cost data for the determination of a rate of reimbursement under AS 47.070.070.[43]

C. The Emergency Regulations Violate Due Process.

As discussed above, CMS approval of changes to DHSS Medicaid reimbursement rates must be approved before any new rates go into effect. Moreover, for facilities, DHSS would need to ask the Alaska legislature to amend AS 47.07.070 to reflect how the new reimbursement rates would be paid as the legislature now requires that they be based on the "reasonable costs related to patient care." After both of those things happen, DHSS can issue new regulations that further explain how reimbursement rates will be paid. But in no

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[42] *Hoag Memorial Hopital Presbyterian*, 866 F.3d at 1079 (invalidating SPA plan including 10% rate reduction approved by CMS for failure to consider equal access to care) (collecting cases).

[43] *State, Dep't of Health and Social Services v. North Star Hosp.*, 280 P.3d 575, 582 (Alaska 2012); *State. Dep't of Health & Social Servs. v. Valley Hosp. Ass'n Inc.*, 116 P.3d 580, 585 (Alaska 2005), both considering regulations based on the prior version of AS 47.07.070(a)(2000), which similarly required reimbursement based on "a fair rate for reasonable costs incurred by the facility."

event can DHSS make rate changes in emergency regulations without allowing an opportunity for notice and comment as a matter of due process under the Alaska constitution.[44]

Because there is an SPA process proscribed by law that includes a notice-and-comment opportunity in the setting of reimbursement rates under both federal and state law, bypassing this process and changing rates through an emergency regulation process violates due process. The requirements of the Alaska Constitution's due process clause, Article I §7, apply to administrative actions.[45] The Alaska Supreme Court adopted the *Matthews v. Eldridge* three-part balancing test to determine whether administrative proceedings satisfy due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[46]

When Congress repealed the Boren Amendment in 1997, it "replaced it with the notice-and comment rulemaking requirements in place today."[47] Because a State may make rate reductions only after CMS gone through the process of approving an SPA by finding

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44 All nursing homes in Alaska directly received notice of a 3% rate reduction that was not even noticed through the emergency regulation process. Hultberg Afft. ¶17. These also need to go through the SPA process and are subject to AS 47.07.070.

45 *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 266 (Alaska 2000).

46 *State, Dep't of Health & Social Services v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 583 (Alaska 2005).

47 *Alaska Dep't of Health and Soc. Servs. v. Ctrs. For Medicare & Medicaid Servs.*, 424 F.3d 931, 941 (9th Cir. 2005).

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that the rate reduction is "consistent with efficient, economy, and quality of care" under §30(A), the State as a matter of law may not make rate reductions by emergency regulation without violating due process rights of the Medicaid providers. Moreover, these notice-and-comment requirements are also found in state law for facility rates. AS 47.07.075. Once approved by CMS, DHSS still needs to go through an administrative process to change facility rates as outlined in AS 47.07.075 (again, after making whatever statutory changes would be necessary, if moving away from reimbursements based on reasonable costs).[48]

D. The Emergency Regulations Are Invalid Because There is No Emergency.

In addition to the other grounds discussed above as to why the emergency regulations are invalid, they are also invalid because "the facts recited in the statement do not constitute an emergency under AS 44.62.250." AS 44.62.300. Under AS 44.62.250, emergency regulations require a finding that the regulations are "necessary for the immediate preservation of the public peace, health, safety, or general welfare." As a matter of state policy, "emergencies are held to a minimum and are rarely found to exist." AS 44.62.270.

There are two problems with this emergency declaration. First, the Dunleavy Administration cannot create its own emergency by vetoing Medicaid funding actually appropriated by the legislature in order to reduce rates through an emergency regulation.

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48 AS 47.07.075 (confirming that actions of the department in setting rates are subject to the Administrative Procedure Act).

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This is a false "emergency" of their own making. Although the legislature cut the Medicaid budget, the legislature likely appropriated sufficient funds to pay providers as required by the Medicaid Act, the CMS approved State Plan and AS 47.07.070, because DHSS could likely absorb those cuts through efficiencies or other cost-containment measures. But on June 29, the Dunleavy Administration vetoed an additional $50,000,000 of State Medicaid funding (causing the State to lose additional federal match dollars) and issued emergency regulations the same day. The Dunleavy Administration cannot flout federal and state law by creating an emergency through the use of the veto power.

Second, as set forth in the affidavits submitted in support, the emergency regulations will actually hurt the health, safety and general welfare of this state by putting health care services at risk. Providers cannot stay in business and provide the same level of care if their funding is drastically cut. If DHSS had studied the effects of the proposed rate changes before trying to implement them, they would have discovered this on their own. But it is not surprising. It is exactly why §30(A) of the Medicaid Act requires states and CMS to study and consider the effects of any proposed rate change on the efficiency, economy, quality of care, and access to care for Medicaid recipients. Conclusory, false statements that the emergency regulations are necessary to protect health, safety and welfare cannot stand in the face of the evidence submitted by Plaintiff ASHNHA.

IV. CONCLUSION

ASHNHA is entitled to summary judgment because DHSS as a matter of federal law cannot change reimbursement rates through regulation until CMS has approved those

rate changes in a SPA approval process under the standards set forth in §30(A) of the Medicaid Act. The emergency and proposed permanent regulations for facilities are also invalid as a matter of state law because they are inconsistent with the legislature's policy directive in AS 47.07.070 to pay facilities rates based upon the "reasonable costs related to patient care." Moreover, because DHSS failed to consider the effects of the rate changes on the efficiency, economy, quality of care, and access to care for Medicaid recipients as required by federal law, as well as the costs of care for facilities as required by state law, all of the rate changes are also invalid because they are arbitrary and unreasonable. Finally, the emergency regulations are also invalid as a violation of due process and because there is no actual valid emergency.

RESPECTFULLY SUBMITTED at Anchorage, Alaska this 12th day of July 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July 2019, a true and correct copy of the foregoing was sent to the following via U.S. Mail and Email:

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